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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Interconnection and Resale Obligations	)	CC Docket No. 94-54
Pertaining to Commercial Mobile Radio	)	DA 97-2558
Services	)	

ADDITIONAL REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC.

AT&T Wireless Services, Inc. ("AT&T"), by its attorneys, hereby submits its reply comments pursuant to the Commission's Public Notice in the above-captioned proceeding. For the reasons set forth in its initial comments on the Public Notice, which were echoed by many parties, AT&T urges the Commission to adopt a limited automatic roaming requirement with a five-year sunset.

I. AN AUTOMATIC ROAMING REQUIREMENT IS NECESSARY AND WITHIN THE COMMISSION'S AUTHORITY

A number of PCS providers, including smaller carriers, explain that an automatic roaming rule is necessary to permit PCS providers to compete fairly with incumbent cellular providers. For example, Cincinnati Bell Wireless Company ("Cincinnati Bell"), which holds the E block license covering the Cincinnati BTA, states that "not having the advantage of a protected duopoly market and a lengthy time frame in which to build extensive networks, PCS entrants have had to rely on roaming to achieve some level of parity with existing providers."[1] In view of

[1] Cincinnati Bell Comments at 5.

the foregoing, Cincinnati Bell correctly asserts, "incumbent operators have strong anticompetitive incentives to deny roaming services to new entrants."[2]

Contrary to the unsupported assertions of some of the incumbent cellular providers, the marketplace has not, and will not, ensure that automatic roaming will be widely available for all CMRS providers. Like AT&T, several other PCS providers note that their attempts to negotiate both in-market and out-of-market roaming arrangements with existing cellular carriers have been unsuccessful. Sprint Spectrum ("Sprint"), for instance, states that it has been unable to enter into *any* roaming agreements with BellSouth, SNET Mobility, and Radiofone, and that AirTouch, Bell Atlantic Mobile, and LA Cellular have refused to provide Sprint with "home-on-home" arrangements.[3] Given the overwhelming evidence of market failure, there is simply no factual foundation for the Cellular Telephone Industry Association's ("CTIA's") assertion that PCS carriers are voluntarily and successfully negotiating in-region and out-of-region agreements with cellular operators on a widespread basis.[4]

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[2] Id. at 3.

[3] Sprint Comments at nn. 12-13. Despite the difficulties it has encountered, which have, at times, left it "virtually excluded from offering roaming capabilities in the areas served by those cellular carriers," Sprint contends that an automatic roaming rule is unnecessary. Id. at 4. Sprint's alternative solution – that PCS providers approach the Commission on a case-by-case basis under Section 202(a) – would be cumbersome and could preclude operators from providing roaming services during the often lengthy litigation process.

[4] CTIA Comments at 6. CTIA cites AT&T's settlement with Bell Atlantic Mobile's ("BAM's") subsidiary, SouthwestCo, as support for its view that the marketplace is working. Id. at 6, n.5. This assertion could not be further from the truth. To the contrary, BAM's initial refusal to provide automatic roaming compelled AT&T to terminate its out-of-market automatic roaming for all of the customers from BAM's Phoenix market. It was only after a lawsuit was instituted and the parties came to a settlement that AT&T was able to obtain in-market automatic roaming. As AT&T noted, smaller and less established new entrants, who do not have an existing cellular customer base and a nationwide cellular network to use as leverage, would have little chance of entering into in-market agreements absent a Commission mandate. AT&T Additional Comments at 5.

The Commission clearly has the authority to compel wireless carriers to offer automatic roaming to redress this market failure and should act to do so to prevent incumbents from using their decade-long headstart to preclude competition from new entrants. AirTouch attempts to revive the argument rejected by the Commission in this docket that "automatic roaming contracts are not a communications service."[5] Contrary to AirTouch's argument, the Commission has provided that roaming – and not just manual roaming – is a service cognizable under Title II. Automatic roaming, like manual roaming, "gives end users access to a foreign network in order to communicate messages of their own choosing."[6]

Automatic roaming is no more a "billing arrangement" – and no less a Title II service – than manual roaming. Nor is automatic roaming simply a billing attribute of manual roaming. The Commission and the courts have recognized that factors such as the way in which customers are billed and the type of dialing sequence required to place a call can give rise to a new service subject to the protections of Sections 201 and 202. In determining whether a service qualifies as a unique service under Title II, it must examined from the customers' perspective.[7] If customers regard two services as different "in any material functional respect," they are considered unique

[5] AirTouch Supplemental Comments at 8-9.

[6] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Second Report and Order, 11 FCC Rcd 9462, 9469, ¶ 10 (1996) ("Second Report and Order").

[7] See e.g., Ad Hoc Telecommunications Users Committee. v. FCC, 680 F.2d 790 (D.C. Cir. 1982).

services.[8] For example, how or whether the customer is billed can serve as a legitimate distinction between services.[9]

Wireless subscribers do not perceive automatic roaming to be functionally equivalent to manual roaming. With automatic roaming, the subscriber simply turns on his or her handset to place a call using the host network. There is no delay in connecting the call, as occurs with manual roaming, which requires the customer to provide credit card and other information to an operator before the call can be made. In addition, automatic roaming typically allows features and functions[10] available to the customer in his/her home market to follow the customer to the visited market. This does not occur when the customer manually roams. Moreover, charges to automatic roamers are incorporated into the bills they regularly receive from their home carriers and they may or may not incur additional roaming charges. In contrast, manual roamers pay for their calls directly to the host carrier. The billing, dialing, features and functions, and timing distinctions of automatic roaming constitute a distinct common carrier service and the Commission has full authority to mandate its availability under Title II.[11]

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[8] Id., 680 F.2d at 794 (test for determining "functional equivalency").

[9] In concluding that 800 service is distinct from traditional MTS, the Commission found that a chief distinguishing factor is that with 800 service, the subscriber, rather than the caller, agrees to pay for the calls. See Toll Free Service Access Codes, Second Report and Order, FCC 97-123, at ¶ 4 (rel. April 11, 1997). While differences in "cost to the carrier and price to the consumer" may not be used to determine whether one service is distinct from another, other factors, such as the type of billing arrangement available to the customer, are valid distinctions. Cf. MCI v. FCC, 917 F.2d 30 (D.C. Cir. 1990).

[10] These features could include call forwarding, call waiting, three-way calling, and caller identification service.

[11] The Commission already has found roaming to be a common carrier service because "it is (1) an interconnected mobile service (2) offered for profit (3) in such a manner as to be available to a substantial portion of the public." Second Report and Order, 11 FCC Rcd at 9469, ¶ 10, n.30. Even if there were merit to AirTouch's argument that the Commission lacks Title II jurisdiction

II. AUTOMATIC ROAMING MUST INCLUDE IN-MARKET ROAMING

The Commission should also reject suggestions by various incumbent cellular providers that any automatic roaming requirement exclude in-market roaming. As AT&T noted, automatic home roaming will foster wireless competition and mitigate the considerable advantages of cellular incumbency.[12] A number of PCS providers agree that in-market roaming is essential as they attempt to construct their systems and compete in the wireless marketplace. Meretel Communications, L.P., a C block licensee, for example, explains that the availability of in-market automatic roaming is necessary to allow PCS providers to compete against cellular providers who have been operating in the market for more than a decade.[13]

There is no basis for AirTouch's assertion that an automatic roaming requirement would deter PCS licensees from constructing their systems. To the contrary, in-market roaming is not a substitute for the construction of facilities; rather, it is a critical component in fostering competition *as networks are being built out*. As Cincinnati Bell points out, PCS providers must

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over automatic roaming, the Commission retains "ancillary jurisdiction" under Title I to order carriers to provide the "billing arrangements" necessary to enable automatic roaming. As AirTouch itself asserted in comments recently filed in the calling party pays docket, the Commission has the authority to, and should, exercise Title I jurisdiction in situations in which incumbents "evidence an anti-competitive intent" in their decisions not to provide a particular billing service. See Comments of AirTouch Communications, Inc., WT Docket No. 97-207, filed Dec. 16, 1997, at 18-25. The exercise of the Commission's ancillary jurisdiction over automatic roaming clearly would be justified because, as described above and in AT&T's initial comments, it would be directed at promoting Congress's goals of fostering a rapid, efficient, Nation-wide, and world-wide wire and radio communication service, 47 U.S.C. § 151, and ensuring regulatory parity among wireless providers. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 107 Stat 312, 392 (1993). See Detariffing of Billing and Collection Services, Report and Order, 102 FCC 2d 1150, 1170 (1986) ("The exercise of ancillary jurisdiction requires a record finding that such regulation would 'be directed at protecting or promoting a statutory purpose.'")

[12] AT&T Additional Comments at 9-10.

[13] Meretel Comments at 1, 3. See also Cincinnati Bell Comments at 4.

have extensive facilities of their own to deliver advanced features to their subscribers and, because roaming must often be subsidized by the home provider, this service is not a sustainable long-term substitute for building out a network.[14] Moreover, both AT&T and Cincinnati Bell have made it abundantly clear that any automatic roaming requirement should sunset in five years, by which time PCS providers will have been able to install complete independent networks in all markets.[15]

Nor is there any justification for some incumbents' fears that they will be left with stranded capacity as PCS providers construct their networks. Not only is this argument internally inconsistent with the incumbents' assertions that automatic roaming will deter PCS providers from constructing facilities, it is not supported by the evidence. As AT&T noted, the Commission's rules already require cellular operators to provide resale capacity to their facilities-based competitors for five years; there are no additional system burdens associated with providing automatic roaming. Moreover, because most PCS carriers have already built out their systems in the most populated areas, in-market, as opposed to out-of-market automatic roaming would occur primarily in areas where existing capacity is likely to be available.[16]

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[14] Cincinnati Bell comments at 4-5. AT&T also notes that, for obvious reasons, automatic roaming will only be available for those carriers that have made an investment in dual mode/dual band handsets. If the Commission declines to mandate automatic roaming, it will deprive the public of the full usefulness of this advanced technology.

[15] AT&T disagrees with the argument of the Telecommunications Resellers Association ("TRA") that the Commission should not impose any sunset on an automatic roaming requirement. See TRA Comments at 7. While an in-market automatic roaming rule is necessary as a short-term solution to prevent cellular incumbents from locking out facilities-based PCS competitors, extension of the rule beyond five years is unnecessary. Resellers, who by definition will never build facilities, are unaffected by the cellular headstart and surely do not require an automatic roaming rule in perpetuity.

[16] Given that most incumbents have shown no reluctance to enter into out-of-market automatic roaming arrangements with both cellular and PCS operators – arrangements that allow the entire

AirTouch contends that in-market roaming should not be considered "roaming" because, historically, "[t]he concept of roaming has been limited to the service a customer receives when 'visiting in another market.'"[17] This argument ignores that the wireless marketplace has changed considerably in the years since the Commission first mandated manual roaming. While the A and B block cellular providers lacked the technical capability to roam on each other's systems, dual mode/dual band handsets, which allow subscribers to switch from digital to analog mode and from the 1900 MHz PCS band to the 900 MHz cellular band, have been available for almost a year. Moreover, while the "wireline" cellular providers had a relatively short headstart over their "non-wireline" cellular competitors, PCS providers are entering the market a decade after their cellular counterparts. Accordingly, even if in-market roaming was not technically possible or even necessary in the past, the Commission should not use this inapposite history as a basis to deny PCS providers automatic in-market roaming today.

The Commission should not endorse any of the proposed solutions that would require PCS providers to obtain in-market automatic roaming only by subterfuge. While TRA suggests that incumbent carriers would have less ability to engage in discriminatory conduct if the Commission requires facilities-based carriers to permit cellular resellers to provide roaming services on a resold basis, AT&T is dubious that such arrangements would provide the necessary relief. If AirTouch, for example, refuses to load the numbers of an in-market PCS operator into its switches directly, it is unlikely to do so indirectly through a reseller. The Commission should simply rule that facilities-based carriers have the obligation to provide automatic roaming, when

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national subscriber base of the home carrier to roam in one particular market – their new-found concerns about requiring in-market roaming are somewhat disingenuous.

[17] AirTouch Comments at 12.

technically feasible, to any requesting CMRS provider – in-market or out-of-market – for a period of five years. In this way, PCS licensees will not have to resort to such convoluted and inefficient "piggy back" mechanisms to obtain automatic home roaming.

Finally, almost as an afterthought, BellSouth raises a grab bag of antitrust arguments in opposition to mandatory automatic "home roaming". These are no more than throw-away arguments, and the Commission should treat them accordingly. Under the antitrust laws, any standard automatic roaming agreement would be analyzed under the rule of reason as a typical network joint venture arrangement. As one of the leading antitrust treatises has observed, because of the substantial scale economies in network industries, "cooperation is the norm" and companies "often form joint ventures to create and operate the networks that are essential to the industry's functions."[18]

[18] ABA Section of Antitrust Law, Antitrust Law Developments (4th ed. 1997), p.411 (citations omitted).

CONCLUSION

For the foregoing reasons, the Commission should mandate automatic roaming, including in-market roaming, between cellular, broadband PCS, and covered SMR carriers for a period of five years.

Respectfully submitted,

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January 20, 1998

DCDOCS: 121722.1 (2lx601!.doc)

CERTIFICATE OF SERVICE

I, Tanya Butler, hereby certify that on this 20th day of January , 1998, I caused copies of the foregoing "**ADDITIONAL REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC.**" to be sent by messenger (*) to the following:

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